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Finance and Administration Cabinet
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Jonathan Miller
Secretary

June 22, 2010

No. 10-14

Mark A. Leath
Vice President of Sales
AirClean Systems
3248 Lake Woodard Drive
Raleigh, NC 27604

RE: Determination of Protest: RFB 758 1000000792 (Drying Cabinets).

Dear Mr. Leath:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of AirClean Systems to the award of RFB 758 1000000792 for Drying Cabinets (the "RFB"). For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") issued the RFB on March 29, 2010. The RFB sought sealed bids for five (5) drying cabinets for use by the Kentucky State Police. The RFB stated that the drying cabinets were to conform to "Air Clean Systems Drysafe, Model #ACEVD36A - 36 x 28 x 84." RFB, page 2 of 14. The RFB allowed the submission of "or equal" models. Accordingly, the RFB listed the following material specifications:

- Polypropylene construction
- Microprocessor controls
- Vapor Proof Lights
- Door and chamber pre filters
- HEPA and Bonded Carbon Exhaust
- Waste pump
- Gas Detector

Pressure Switch
Stainless Steel Drying Rod
Three Collapsible Shelves
Drain
Electrical: 110/220V, 2.8/1.4 Amps, 308W consumption

Id. The RFP further provided:

General

This Solicitation specifies requested items. It is not the intention of this Solicitation to eliminate Vendors or manufacturers of similar or equal equipment of the types specified. It should be noted, however, that these requested items are written around specific needs of State agencies. The Commonwealth reserves the right to consider bids non-responsive if they do not comply with the specifications contained herein.

Exceptions to Specifications

Any exceptions to the specifications must be clearly pointed out. Otherwise, it will be considered that items/services offered are in strict compliance with these specifications, and the successful bidder shall be held responsible for delivering materials/services that meet these specifications. Any exceptions shall be marked as such within the body of the bid and explained on a separate page. The Commonwealth is not bound to accept any exceptions and exceptions taken may cause the bid to be deemed non-responsive.

Alternate Brands/Specifications

Unless otherwise specified, brands and specifications referenced in this Solicitation are meant to establish a minimum standard of quality only. Bidders may bid brands/specifications they consider to be equal by specifying the brand(s)/specifications and inserting the brand name(s), model number(s), etc. on which they are bidding. Bids offering "equal" products/specifications will be considered for award if such products are clearly identified in the bid and are determined by the State to meet or exceed fully the minimum essential specifications and salient characteristics referenced in the Solicitation. Bids that contain products/specifications that fail to meet the minimum essential requirements shall be deemed non-responsive.

Bidders who propose alternate brands/specifications must enclose descriptive literature with their bids so that the equality can be verified. Failure to enclose sufficient literature may result in a non-responsive bid. If the brands are not changed, the Contract will be written accordingly and the successful bidder shall be required to deliver the brands/specifications stated in the Solicitation.

RFB, page 6 of 14.

The RFB closed on April 14, 2010. Five vendors submitted bids. Air Science USA, LLC proposed a product which it contended was an equal to the product specified. AirClean Systems proposed the exact product after which the specifications were based. Air Science USA, LLC was awarded the highest total best value points with 97.3. AirClean Systems was awarded the second highest points with 91.3 points. OPS awarded a contract to Air Science USA, LLC on April 21, 2010.

On April 27, 2010, AirClean Systems filed a protest to the award. In its written protest, AirClean Systems contends that the product offered by Air Science USA, LLC did not meet the RFB specifications. By letter dated May 4, 2010, Air Science USA, LLC filed a response to the protest. On May 5th, OPS filed its response.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet (the "Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. AirClean Systems submitted a bid in response to the RFB. Therefore, AirClean Systems has standing to protest the award of the RFB.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here, the award was made on April 21, 2010. The protest was filed on April 27, 2010. The protest letter was filed within two calendar weeks of the award and, accordingly, is timely.

This procurement was conducted as "competitive sealed bidding" under KRS 45A.080. This process utilizes a Request for Bids or RFB. In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be "best value."

The protester bears the burden of proof. See *Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) ("protester has burden of demonstrating the merits of its case."); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). The burden is not met by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Moreover, a

determination by an agency is entitled to a presumption of correctness. KRS 45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). The Secretary will only intervene only when it is clear that the

agency's determination was irrational or unreasonable. *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). An "alternative interpretation" of the terms of the solicitation will not establish an arbitrary or capricious determination. *Laboratory Corp. of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky.App. 2005). In sum, the Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. See *Laboratory Corp. of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examines whether the error was prejudicial to the protestor.

Applying these general rules to AirClean Systems's specific ground of protest, the Secretary finds as follows:

AirClean System's protest alleges that the awarded vendor did not meet the specifications of the RFB. A review of the specifications of the Air Science USA, LLC model indicates that it did meet the required specifications. The AirClean System model and the Air Science USA, LLC model were not identical. The RFB asked for the AirClean System model *or equal*. A proposed substitution was only required to meet the basic requirements stated. An "or equal" product need not be identical, but only functionally equivalent. *Matter of: Ross Cook, Inc.*, 88-2 CPD ¶216 (Comp.Gen. 1988). This determination to award the contract to Air Science USA, LLC was not arbitrary or irrational. Therefore, there is no basis to overturn the award.

Accordingly, upon review of the record, AirClean Systems has failed to overcome the presumption of correctness provided by KRS 45A.280. AirClean Systems has also failed to establish prejudice. The protest, therefore, must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Matthew Cole, OPS